

## MEMORANDUM OF LAW

DATE: October 29, 1993

TO: Jim Nunez, Contract Compliance Officer, Equal  
Opportunity Contracting Program

FROM: City Attorney

SUBJECT: Certification of National City Hardware as MBE/WBE  
Vendor

Recently, a contract was awarded to Mingus Constructors of Cottonwood, Arizona. One of Mingus' listed MBE/WBE subcontractors, National City Materials ("NCM"), was to provide redi-mix cement for the project. Subsequent to the award of the contract, questions arose as to whether NCM met the City's qualifications to be a certified supplier. NCM has protested its disqualification by the City as a certified supplier of redi-mix concrete. As a result of NCM's protest, you have requested a legal opinion as to whether the Code of Federal Regulations, specifically, 49 C.F.R. Section 23.47(e)(3) is applicable to the City's determination of the criteria of a regular dealer, or if the Federal Acquisition Regulations ("FAR") proffered by Mr. Nelson Robinson of the San Diego Minority Business Development Center overrides the dictates of the Code of Federal Regulations.

### ANALYSIS

The issue of whether 49 C.F.R. Section 23.47, utilized by the Equal Opportunity Contracting Program ("EOCP"), or the FAR proffered by Mr. Robinson is determinative of the definition of regular dealer is misleading, as both are part of the Code of Federal Regulations. The FAR is found at 48 C.F.R. Section 22.606 et seq. The FAR, as the title indicates, is directed specifically at contracts for Federal acquisitions, while 49 C.F.R. Section 23 et seq., are regulations promulgated by the Department of Transportation and are more commonly used by state and local agencies using Federal funds.

The FAR at 48 C.F.R. section 22.606-2(a) cites 41 C.F.R. section 50-206.53 as the appropriate guideline for defining regular dealer. This section reads in pertinent part:

- (a) A bidder may qualify  
as a regular dealer under 41 CFR

50-201.101(b) if it owns, operates, or maintains a store, warehouse, or other establishment in which the commodities or goods of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business. The storage of goods in a public warehouse will not in itself satisfy the place of business requirements of this definition unless there is a continuing right (i.e. bona fide written lease agreement) to a specified, identified amount of space in the warehouse. A bidder who desires to qualify for award as a regular dealer must show to the satisfaction of the contracting agency prior to any award that it is engaged in an established, regular business meeting all the criteria of 41 CFR 50-201.101(a)(2). It is not enough in the case of a regular dealer to show only that arrangements have been made to set up such a business; before an award can be made, it is essential that it shows an already established business regularly dealing in the particular goods or goods of the general character offered to the Government.

(b) A bidder must be able to show before award:

(1) That the bidder has an establishment or leased or assigned space in which it regularly maintains a stock of goods in which it claims to be a dealer; if the space is in a public warehouse, it must be maintained on a continuing, and not on a demand, basis;

(2) That the stock

maintained is a true inventory from which sales are made; the requirement is not satisfied by a stock of sample or display goods, or by a stock consisting of surplus goods remaining from prior orders, or by stock unrelated to the supplies which are the subject of the bid, or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

(3) That the goods stocked are of the same general character as the goods to be supplied under the contract; to be of the same general character, the items to be supplied must be either identical with those in stock or goods for which dealers in the same line of business would be an obvious source;

(4) That sales are made regularly from stock on a recurring basis; they cannot be only occasional and constitute an exception to the usual operations of the business; the proportion of sales from stock that will satisfy the requirements will depend upon the character of the business;

(5) That sales are made regularly in the usual course of business to the public, i.e., to purchasers other than Federal, State, or local Government agencies; this requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made such sales; if Government agencies are the sole purchasers, the bidder will not qualify as a regular dealer; the number and amount of sales which must be made to the public will necessarily vary with the amount of

total sales and the nature of the business; and

(6) That the business is an established and going concern; it is not sufficient to show that arrangements have been made to set up such a business.

(c) With regard to the test in paragraphs (b)(5) and (6) of this section, as stated in the Decision of the Administrator, "In re Herbert Co." (9 WH Cases 561, 562 (1950)): "It is plain that the Act and Regulations intended to bar from receipt of Government contracts those persons whose regular method of operation is to secure contracts and thereafter buy elsewhere the goods necessary to fill the contract.

While it was not contemplated by the regulations that every Government contract awarded to a dealer be filled from stock on hand, it was the intention to require that Government contracts should be awarded only to those dealers who maintain a stock of goods of the general character required under the Government contract in question, and who, as a regular course of business dealings, make sales from such stocks. It is not sufficient for a dealer to show that some sales are made from stock, or that sales from stock are not unusual in his business; rather he must show that in the usual course of his business a very substantial amount of his sales are made from stocks on hand." (Emphasis added.)

41 C.F.R. Section 50-206.53 (1993).

From the cited regulation, it is clear that the prime concern of the definition is that a regular dealer be involved in the sale of the proffered goods in the usual course of business and not purchased on a demand basis in response to a request for a bid. For example, in the instant case, NCM is a small consumer

oriented hardware store that purchases redi-mix cement from a regular dealer on an as needed basis. Note that the regulation indicates in Section (a) that whether an entity is a regular dealer is a factual determination to be made by the contracting agency. Here, the contracting agency is the City and the EOCP is the department of the City charged with making the factual determination.

#### CONCLUSION

41 C.F.R. Section 50-206.53 defines regular dealer for purposes of both the Department of Transportation Regulations and the Federal Acquisition Regulations. Using the regulation as a guide, the EOCP must make a factual determination concerning whether the requirements are met by a particular business. Unless more information is provided which demonstrates to the satisfaction of the EOCP that NCM sells, in the regular course of its business, the necessary materials, the decision of the EOCP is a binding factual determination.

If you have any questions, please give me a call.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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